No. 16040

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ALBERT S. CRAIG, *et al.*,

Appellants,

vs.

FAR WEST ENGINEERING COMPANY, INC., a corporation,

Appellee.

FAR WEST ENGINEERING COMPANY, INC., a corporation,

Appellant,

vs.

ALBERT S. CRAIG, *et al.*,

Appellees.

REPLY BRIEF OF FAR WEST ENGINEERING COMPANY, INC. AS AN APPELLANT.

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Introduction.

The "Answering Brief of Plaintiffs Appellees-Appellants" Craig, *et al.*, deals with only three of the four topics raised in the "Opening Brief" filed on behalf of Far West as an appellant. For this reason, this discussion will be confined solely to the three points raised.

ARGUMENT.

A. The Work Here Involved Is Not "Interstate Commerce" Within the Meaning of the Applicable Legislation.

The essential factual contentions set forth in the Opening Brief of Far West (Op. Br. pp. 4-6) remain unchallenged. Thus, it is undisputed that what we are here considering is the performance, supervision, and direction of design engineering and drafting work—all in California and at California facilities by California *engineers.* Goods, as such, were not produced, nor were tools or dies fabricated to produce the same.

By way of argument, following the technique heretofore established, our attention is called to this writer with the following phrasing: ". . . Defendant's counsel leads us astray as he attempts to . . ." Two cases, cited by defendant Far West in its opening brief, *Collins v. Ford, Bacon & Davis,* 71 Fed. Supp. 229, *McComb v. Turpin,* 81 Fed. Supp. 86, are described as having different facts than the present case. Yet no attack is made on the fundamental propositions these cases, among others, were cited to support. For clarity, let us review the logical sequence of the propositions advanced by the defendant Far West, as an appellant, in its opening brief, with a portion of the authority cited:

> 1. Congress did not, in the enactment of the Fair Labor Standards Act (29 *United States Code,* Section 201, *et seq.*) exercise the full measure of its commerce power, but instead proposed to leave local business to state regulation.
>
> *E. C. Schroeder Co. v. Clifton,* 153 F. 2d 385.

2. Courts should not by forced argument extend congressional enactment beyond their reasonable confines in assertions of interstate commerce.

Jenkins v. Durkin, 208 F. 2d 94.

3. Nearness to or possible implication in interstate commerce is not the test. The term "engaged in interstate commerce" as used in the Act is not one merely limited by the power of imagination.

Mateo v. Auto Rental Co., 240 F. 2d 831.

4. It is the nature of the employee's work rather than the nature of the employer's business which brings him within or excludes him from the Act.

Johnston v. Cotton Producers Assn., 244 F. 2d 553.

(a) Even in cases where the employees work on materials brought in from outside of the state, coverage is not automatic.

Selby v. J. A. Jones Const. Co., 175 F. 2d 143.

(b) Nor is coverage automatic because the employer engages in interstate commerce or has offices in various states.

Mitchell v. Household Finance Corp., 208 F. 2d 667.

(c) Nor is coverage automatic even if employees are working on a road or dock from which interstate commerce may be carried on and therefore would facilitate the same.

Koepfle v. Faravaglia, 200 F. 2d 191;

Nieves v. Standard Dredging Corp., 152 F. 2d 719.

(d) Nor is coverage automatic even where employees cross state lines to perform their duties.

Mitchell v. Kroger Co., 150 Fed. Supp. 30.

To the foregoing analysis, itself, the plaintiffs Craig, *et al.,* make no reply, but content themselves with a critique of defendant Far West's "apparent" usage of certain words, such as "goods" and "produced." Actually, the cause here is not a problem in semantics, and it is surprising to see it approached from such an angle. The undisputed, unchallenged summary of the work and duties of the plaintiffs is given in Section C of defendant Far West's opening brief. (See Far West's Op. Br. pp. 9-14.) Reference to the payroll records will show them all highly paid employees. [Exs. A through J; *cf.,* Tr. p. 177.] All had professional qualifications and either did or supervised the doing of design engineering. The work performed was done solely in California. One plaintiff only, Carl L. Clement, would from time to time travel to Tucson, Arizona to pick up work or papers or to return completed work for Hughes, Tucson. Of Mr. Clement, at the conclusion of his own testimony, the trial judge remarked [Tr. p. 224]:

> "The Court: I suggest that you have the other people. I will tell you, I am not going to allow this man anything, because I can't see how this man would be entitled to one penny. Do you think so under the testimony he has given? You are just wasting my time and wasting your own time wasting this man's time."

The Department of Labor cited the decision of *McComb v. Turpin,* 81 Fed. Supp. 86 in its Interpretative

Bulletin, Part 776, Subpart A, General (May, 1950), Title 29, Chapter V, *Code of Federal Regulations* (776.19(b) (2)), saying:

> "On the other hand, the legislative history makes it clear that employees of a 'local architectural firm' are not brought within the coverage of the Act by reason of the fact that their activities 'include the preparation of plans for the alteration of buildings within the state which are used to produce goods for interstate commerce.' Such activities are not 'directly essential' enough to the production of goods in the buildings to establish the required close relationship between their performance and such production when they are performed by employees of such a 'local' firm."

In a somewhat broader sense, the Supreme Court, in declaring maintenance employees in a building including a large number of tenants in interstate commerce as exempt from the provisions of the Fair Labor Standards Act, stated (*10 East 40th Street Building, Inc. v. Callus*, 325 U. S. 578, at page 583):

> "Mere separation of an occupation from the physical process of production does not preclude application of the Fair Labor Standards Act. But remoteness of a particular occupation from the physical process is a relevant factor in drawing the line. Running an office building as an entirely independent enterprise is too many steps removed from the physical process of the production of goods. Such remoteness is insulated from the Fair Labor Standards Act by these considerations pertinent to the Federal system which led Congress not to sweep predominantly local situations within the confines of the Act. To assign the maintenance men of such an office building to the productive process because of manu-

facturing enterprises is to indulge in an analysis too attenuated for appropriate regard to the regulatory power of the States which Congress saw fit to reserve to them. Dialetic inconsistencies do not weaken the validity of practical adjustments, as between the state and federal authority, when Congress has cast the duty of making them upon the Courts. Our problem is not an exercise in scholastic logic."

B. The Plaintiffs Philip Gindes and James M. D. Linick, Having Invoked the Jurisdiction of the District Court, but Refusing to Submit to Discovery Under the Federal Rules of Civil Procedure, Should Have Their Actions Dismissed.

Here, again, there is no dispute in the factual situation. The plaintiffs Craig, *et al.* occupy about a page and one half of their answering brief in regard to this general subject, but they leave unanswered the question the defendant Far West posed in its opening brief: May plaintiffs, who invoked the jurisdiction of the Federal Court, with impunity flout the very discovery principles there established? Perhaps they intended to answer inferentially in the affirmative. As set in defendant Far West's opening brief (Op. Br. pp. 6-8) at greater length, these are the undisputed facts:

1. Both plaintiffs, Gindes and Linick, were served with a subpoena *re* deposition. [Tr. pp. 90-91, 117-118.]

2. Timely notice of the taking of these plaintiffs depositions was given to opposing counsel. [Tr. pp. 19-21.]

3. Counsel for these two plaintiffs moved the District Court for protection and delay of the deposi-

tions [Tr. pp. 98-99, 137], which motions the Court denied on hearing, stating:

"I think if the plaintiffs come here and want the process of this court they had better be prepared to submit to its processes." [Tr. p. 138.]

4. The plaintiffs Gindes and Linick did not appear for the taking of their depositions. [Tr. pp. 92-102.]

5. Defendant Far West's motion to dismiss the two plaintiffs was "denied without prejudice to its renewal at the time of trial." [Tr. pp. 109, 120.]

6. Neither plaintiff, Gindes or Linick, appeared at the time of trial, their counsel there reporting [Tr. p. 224]:

"Mr. Kraker: Mr. Gindes is on defense work in Philadelphia. He should be back within a few days. . . . Linick is not available."

7. Defendant Far West's renewed motions to dismiss plaintiffs Gindes and Linick [Tr. pp. 109-110, 120] were summarily denied by Judge Solomon. [Tr. pp. 112, 122.]

Such a recital makes a mockery of discovery proceedings. Here the defendant Far West, in spite of the most diligent efforts, was unable to examine the plaintiffs Gindes and Linick from the time of filing of complaint through judgment. Without citation of authority, the plaintiffs Craig, *et al.,* give two justifications, viz., a default in the Gindes case, and "there was nothing of fact discoverable from Gindes or Linick, . . ." Both the record and common sense dispute these propositions.

I.

The Gindes Case Was Never Properly in Default but in Any Event the Facts Do Not Justify Plaintiff's Ignoring Court Process.

Even though within ten days of a determination on a motion to dismiss, default was applied for in the Gindes case. [Tr. pp. 21-24.] Noting the attempt made to obtain default, the defendant Far West moved to set aside the same promptly. [Tr. pp. 25-30.] Hearing was held on this motion and determination in favor of defendant Far West's position was made on January 13, 1958 [Tr. p. 43], and before the scheduled appearance of the plaintiff Gindes pursuant to *notice and subpoena* on January 14, 1958. [Tr. pp. 90-91.] In setting aside the attempted defaults on January 13, 1958, the Court remarked [Tr. p. 131]:

> "The Court: I think the defaults were prematurely taken, counsel. I do not think there is any excuse for them having been entered, and the motion to set aside the defaults is granted."

At the same hearing, on January 13, 1958, the plaintiffs Gindes' and Linick's motions for protection and for delay in the taking of their depositions as set for a date thereafter, came on for determination. During his argument, counsel for plaintiffs stated as follows [Tr. p. 137]:

> "All of the plaintiffs have been subpoenaed for the taking of their depositions on January 14th. Technically the plaintiffs under dispute did not have to respond to the subpoena. However, I am not arguing that."

At the conclusion of the hearing, the Court announced from the bench that the motions to continue the time of taking depositions would be denied. [Tr. p. 38.] This

was formalized by minute order the same date. [Tr. p. 43.]

In its opening brief (Op. Br. p. 8), the defendant Far West has set forth the applicable law, to which the plaintiffs have given no response of authority. It would be difficult to imagine a more patent disregard of Court process or the rights of a party litigant. With an uncontradicted record, if the *Federal Rules of Civil Procedure,* and particularly Rule 37(d) thereof, mean anything, this is not an appropriate area of discretion. Disobedience of judicial process should carry the consequences the law provides, or we should frankly abandon the concept of the authority of judicial process in favor of a rule of convenience.

II.

Failure of the Plaintiffs Gindes and Linick to Observe the Court's Subpoena Re Deposition Is Not Excused by Their Assertion That "There Was Nothing in Fact Discoverable From" Them.

The fact that plaintiffs contend to the contrary is surprising. It is less surprising that plaintiffs are unable to cite a single authority to support their remarkable proposition. It is submitted that there is no such authority, and that such a position is intellectually insupportable.

In view of the uncontradicted facts heretofore set out, one may feel morally confused at plaintiffs' position. However, one cannot fail to feel logically outraged. What right does the adverse party have to adjudicate in advance the course, scope, and value of a particular line of discovery inquiry to a particular litigant? This Court has heretofore spoken to uphold the sanctions supporting the discovery process.

Collins v. Wayland, 139 F. 2d 677.

C. Plaintiffs Were Exempted From the Overtime Provisions of the Applicable Legislation.

I.

By Reason of the Court's Findings.

Pursuant to the trial court's direction, plaintiffs submitted and the Court signed in each of the within cases a *finding* substantially as follows [Tr. p. 47]:

> "VIII.
>
> That defendant's failure to compensate Craig for such employment in excess of forty (40) hours in such workweeks at rates not less than one and one-half (1½) times the regular rates at which he was employed was in good faith."

Section 258 and 259 (*29 United States Code*) provide that liability or punishment will not accrue to the employer who, acting in "good faith" upon the approval or interpretation of the Department of Labor, fails to pay overtime compensation under the Fair Labor Standards Act.

This cause is not past the contention stage. The trial court, based upon evidence in the record [see, *e.g.,* Tr. pp. 164-167], made the *finding* quoted above that the defendant Far West's failure to compensate plaintiffs for employment in excess of 40 hours per week *"was in good faith."* As previously declared by this Court in a case of similar character, *Lassiter v. Guy F. Atkinson Co.,* 176 F. 2d 984, at page 993:

> "Whether the employers here acted in good faith is essentially a question of fact. This fact has been found by the trial court."

It is possible to make the argument that the approval or interpretation must invariably be (1) in writing, and (2)

by the Wage and Hour Division of the Department of Labor. The Courts have not required so inflexible and wooden an approach.

See

Reed v. Murphy, 232 F. 2d 668, 674.

II.

The Evidence Confirms the Exemption Status of Plaintiffs by Reason of a Guaranteed Compensation Arrangement.

The applicable statutory law and regulations are set forth in the defendant Far West's opening presentation. (Op. Br. pp. 14-20.) Plaintiffs sweepingly reject defendant's analysis, but give us little to justify the generalization made.

Aside from the presentation of defendant Far West, referred to above, additional corroboration exists in the record. An examination of Exhibits A through J shows the following, as testified by the defendant Far West's president [Tr. p. 159]:

Plaintiff's Name	Amount for 40 Hrs. 5 Hrs. Overtime (Weekly Guarantee)	Actual Approx. Average Weekly Earnings During Supervisorial Period
Craig	$178.13	$221.10
Soldis	190.00	233.60
Gaiennie	125.88	171.50
Morrison	201.88	256.40
Pyle	178.13	203.20
Ingildsen	178.13	212.10
Clement	178.13	242.60
Linick	166.25	178.40
Gindes	190.00	228.30
Massar	130.62	142.70

(Care should be taken to avoid confusion with other weeks shown, where, as appears, both straight-time and over-

time were paid.) Now, for the period of supervisory engineering work, as alleged by the complaint, and limited only to the executive "straight-time" weeks, the Exhibits A through J (excluding, of course, in certain instances, the commencing or terminal weeks), demonstrates that the weekly guarantee was exceeded.

III.

The Law Compels the Conclusion That Plaintiffs Were Exempted Under the Act.

An argument might be made on the basis of the recent decision of *Mitchell v. Lublin, McGuaghy, et al.*, ... U. S. ....., 36 Labor Cases, Section 65149, where work done by employees of an architectural and consulting firm which did work in and maintained offices in the District of Columbia and nearby states was considered to be of a character to invoke coverage of the Act. In the present case before this Court we are concerned with professional and supervisory *engineering* personnel. It is clear that such personnel were considered exempted under *Mitchell v. Lublin, etc., supra,* for the Court states:

> "The parties are agreed that respondent's professional employees—architects and engineers—are exempted from the coverage of the Act by §13(a)(1), 29 U. S. C. §213(a)(1). Therefore, the Secretary's injunction action is directed at some fifty employees mentioned above: draftsmen, fieldmen, clerks and stenographers."

The Court went on to some pains to review the actual interstate character of the work actually performed by the employees mentioned, including actually crossing state lines in gathering data. (Fieldmen included surveyors, transitmen, and chainmen who often crossed state lines.) The long-utilized test of the individual employee's actual

activity is again confirmed. It is interesting to note that even as regards such character of employees, performing such basic activities, the dissenting Justices felt that the factual determination of coverage was not clearly covered by the Act.

In connection with this matter, it is doubtless fair to point out that a cook and caretaker for maintenance-of-way men *on an interstate railway line* has been held not covered by the Act. *McLeod v. Threlkeld,* 319 U. S. 491, *cf., Chicago & E. I. R. Co. v. Industrial Com.,* 284 U. S. 296. The Courts will, in delimiting the coverage of an Act of Congress, give great if not controlling, consideration of the evils intended to be corrected by the subject legislation. *Apex Hosiery v. Leader,* 310 U. S. 469. It would seem clear, in evaluating the intent of Congress in enacting the *Fair Labor Standards Act, 29 United States Code, Section 202* (see discussion, Opening Brief of defendant Far West, pp. 18-20), that plaintiffs Craig, *et al.,* have not carried the burden of proof in establishing here "labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being" of the workers here involved.

Conclusion.

It is respectfully submitted that the Judgment of the District Court is erroneous and should be reversed with instructions, on the grounds heretofore set forth.

Respectfully submitted,

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